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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA (Phoenix)

THOMAS SHORT,

Plaintiff,

v.

DAVID BERGER, in his official
capacity as Commandant of the United
States Marine Corps, and CARLOS DEL
TORO, in his official capacity as
Secretary of the Navy,

Defendants.

No.:

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF**

- 1. Religious Freedom Restoration Act**
(42 U.S.C. §2000bb-1, et seq.)
- 2. 42 U.S.C. §1983 – Free Exercise**
- 3. 10 U.S.C. 1107a**
- 4. Administrative Procedures Act**
(5 U.S.C. §§706 et seq.)

1 Plaintiff alleges as follows:

2 **PARTIES**

3 1. Plaintiff Thomas Short is a commissioned officer in the active component of
4 the United States Marine Corps.

5 2. Plaintiff Thomas Short is a Major, currently assigned to Marine Corps Air
6 Station Yuma, Arizona.

7 3. Defendant David Berger is a General and is the Commandant of the United
8 States Marine Corps. He is geographically located in Washington, D.C. General
9 Berger is sued in his official capacity.

10 4. Defendant Carlos Del Toro, is the Secretary of the Navy. Secretary Del Toro
11 is sued in his official capacity.

12 5. **JURISDICTION:** This Court has jurisdiction over this action pursuant to
13 Title 28 U.S.C. §§1331 and 1343(3) in that the controversy arises under 21 U.S.C. §
14 301 *et seq.*, 42 U.S.C. § 262 *et seq.*, 10 U.S.C. § 1107a, as well as ALNAV 062/21, and
15 MARADMIN 462/21 (collectively, the “Vaccine Mandates”).

16 6. Jurisdiction is also proper in this Court under the Administrative Procedures
17 Act, 5 U.S.C. §§ 702, 704, and under 28 U.S.C. § 2201, which states that actions
18 involving controversies with federal agencies may be pursued in any United States
19 District Court. The Defendants’ Vaccine Mandates, and Plaintiff Thomas Short’s final
20 appeal denial, described herein, are final agency actions for which there is no other
21 adequate remedy in a court. These actions mark the consummation of the agency’s
22 decision-making process with respect to the Department of the Navy and the Marine
23 Corps’ mandates, and Plaintiff Thomas Short’s religious exemption request.

24 7. **INTRADISTRICT ASSIGNMENT:** Venue is proper in this district under
25 28 U.S.C. §1391(e) because the Defendants are all officers or employees of the United
26 States government and the legal residence of the plaintiff is within this district and
27 division and no real property is involved in this action.
28

FACTUAL ALLEGATIONS

8. It is well-established that 10 United State Code section 1107a prohibits the Department of Defense from requiring service members to take an Emergency Use Authorization (“EUA”) product, absent a written presidential waiver.¹ A published Department of Justice Memorandum Opinion for the Counsel to the President dated July 6, 2021, states: “DOD informs us that it has understood section 1107a to mean that DOD may not require service members to take an EUA product that is subject to the condition regarding the option to refuse, unless the President exercises the waiver authority contained in section 1107a.”²

9. On July 12, 2021, Defendant Berger signed and issued a revision to the Marine Corps’ implementation of the Religious Freedom Restoration Act, Marine Corps Order 1730.9 “Accommodation of Religious Practices in the Marine Corps.”³

10. In this Order, Defendant Berger stated:

“The Marine Corps requires immunization for all Marines, based upon our compelling interest in military readiness and the health and safety of the Total Force. Immunizations are an important component of individual and unit medical readiness. Marines may be called upon to operate in environments and under conditions that increase their exposure and susceptibility to illness, particularly in deployed environments and when Marines are required to be in close proximity to each other such recruit training and embarked on ships, aircraft, and military vehicles. Mission accomplishment may require that Marines be immunized to protect against disease due to increased exposure

¹ See, Department of Defense Instruction (“DODI”) “Application of Food and Drug Administration Rules to Department of Defense Force Health Protection Programs.” <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/620002p.pdf>

² <https://www.justice.gov/olc/file/1415446/download>

³ <https://www.marines.mil/Portals/1/Publications/MCO%201730.9.pdf?ver=EEMe3SQH2P9-Z4Bs1GIwtQ%3d%3d>

1 potential, or to conform with international health regulations incident to
2 foreign travel or unit deployment.”

3 Defendant Berger thus pre-determined that the Marines have a compelling interest in
4 vaccination of 100% of the Marine Corps, regardless of the vaccination or the Marine.
5 He provided for no possibility of an immunization that the Marine Corps might have an
6 interest in requiring that is less than compelling.

7 11. The Marine Corps has implemented Marine Corps Order 1730.9 to requests
8 for religious exemption from the COVID-19 vaccine in the following way. A Marine
9 requesting a religious exemption from COVID-19 vaccination must complete a
10 religious exemption form, NAVMC 10274 AA. Next, the Marine interviews with a
11 chaplain, who assesses whether the applicant’s beliefs appear sincerely held. The
12 chaplain routes the assessment to the applicant’s commander, who routes the
13 application through the chain of command to the Deputy Commandant, Manpower and
14 Reserve Affairs.

15 12. The Deputy Commandant reviews the application and consults with legal
16 counsel and the Religious Accommodation Board. The Religious Accommodation
17 Board, comprising at least three voting members and a recorder, a legal advisor, and a
18 chaplain advisor, reviews each request for a religious exemption, writes an assessment
19 of the request, and recommends granting, granting-in-part, or denying the request.
20 Marine Corps Order 1730.9 requires the Deputy Commandant to resolve each request
21 “on a case-by-case basis” and to “articulate the factual basis underlying their decision.”
22 Under the regulations, the reviewing authority can deny the request only if “there is no
23 lesser restrictive means to furthering” a “compelling government interest.”

24 13. The Deputy Commandant resolves the request within sixty days. The Marine
25 receives written notice of the decision and, if applicable, “any conditions or limitations
26 placed on the approval to meet the compelling govern-mental interest in mission
27
28

1 accomplishment.” If the request is denied, the Marine can appeal to the Commandant of
2 the Marine Corps, who issues a final decision.

3 14. If the Commandant denies the appeal (or if the Marine declines to appeal),
4 the Marine receives an order to submit to COVID-19 vaccination by a certain deadline.
5 Under MARADMIN 612/21, if a Marine officer fails to timely begin COVID-19
6 vaccination, the Marine officer has “refused the vaccine” and is reported for
7 administrative separation based on misconduct, moral or professional dereliction, and
8 substandard performance.

9 15. On August 23, 2021, the Food and Drug Administration approved BioNTech
10 Manufacturing’s Biologics License Application (BLA) for production and marketing of
11 Comirnaty, prescribing certain labeling and production requirements in its “August 23,
12 2021 Approval Letter – Comirnaty.”⁴

13 16. On August 23, 2021, the Food and Drug Administration also re-issued the
14 Emergency Use Authorization (“Pfizer-BioNTech COVID-19 Vaccine EUA LOA
15 reissued August 23 2021”) “to clarify that the EUA will remain in place for the Pfizer-
16 BioNTech COVID-19 vaccine, and to authorize use of COMIRNATY (COVID-19
17 Vaccine, mRNA) under this EUA for certain uses that are not included in the approved
18 BLA.

19 17. A footnote to the August 23rd LOA⁵ states: “The licensed vaccine has the
20 same formulation as the EUA-authorized vaccine and the products can be used
21 interchangeably to provide the vaccination series without presenting any safety or
22 effectiveness concerns. The products are legally distinct with certain differences that do
23 not impact safety or effectiveness.”

24 _____
25 ⁴ <https://www.fda.gov/media/151710/download>

26 ⁵ The current, further revised LOA re-issued December 16, 2021 (“Pfizer-BioNTech COVID-19
27 Vaccine EUA LOA reissued December 16 2021”), states: “Although COMIRNATY (COVID-19
28 Vaccine, mRNA) is approved to prevent COVID-19 in individuals 16 years of age and older,
there is not sufficient approved vaccine available for distribution to this population in its entirety
at the time of reissuance of this EUA.”

1 18. On August 23, 2021, the Food and Drug Administration also issued a
 2 “Vaccine Information Sheet for Recipients and Caregivers About Comirnaty COVID-
 3 19 Vaccine, mRNA) and Pfizer-BioNTech COVID-19 Vaccine to Prevent Coronavirus
 4 Disease 2019 (COVID-19).” This information sheet informed the recipient:

5 “You are being offered either COMIRNATY (COVID-19 Vaccine, mRNA)
 6 or the Pfizer-BioNTech COVID-19 Vaccine to prevent Coronavirus Disease
 7 2019 caused by SARS-CoV-2. This Vaccine Information Fact Sheet for
 8 Recipients and Caregivers comprises the Fact Sheet for the authorized Pfizer-
 9 BioNTech COVID-19 Vaccine and also includes information about the FDA-
 10 licensed vaccine, COMIRNATY (COVID-19 Vaccine, mRNA).”

11 19. On August 30, 2021, Defendant Del Toro issued ALNAV 062/21 entitled
 12 “Department of Navy Mandatory Covid 19 Vaccination Policy”⁶ that stated in pertinent
 13 part, as follows:

14 “Effective immediately, all DON active duty Service Members, who are not
 15 already vaccinated or exempted, are required to be fully vaccinated within 90
 16 days and all Reserve Component Service Members are required to be fully
 17 vaccinated within 120 days of this issuance with an FDA approved
 18 vaccination against COVID-19. ... The order to obtain full vaccination is a
 19 lawful order, and failure to comply is punishable as a violation of a lawful
 20 order under Article 92, Uniform Code of Military Justice, and may result in
 21 punitive or adverse administrative action or both. The Chief of Naval
 22 Operations and Commandant of the Marine Corps have authority to exercise
 23 the full range of administrative and disciplinary actions to hold non-exempt
 24 Service Members appropriately accountable. This may include, but is not
 25 limited to, removal of qualification for advancement, promotions,

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 27 ⁶

28 https://www.mynavyhr.navy.mil/Portals/55/Messages/ALNAV/ALN2021/ALN21062.txt?ver=Vbl_3soAE1K4DhYwqjSGLw%3d%3d

reenlistment, or continuation, consistent with existing regulations, or otherwise considering vaccination status in personnel actions as appropriate.”

20. On September 1, 2021, Defendant Berger issued Marine Administrative Message (MARADMIN) 462/21⁷ that stated in pertinent part:

“3.a. . . . all Marine Corps active and reserve component (Active Reserve, Selected Marine Corps Reserve, and Individual Mobilization Augmentee) service members shall be fully vaccinated against COVID-19, unless medically or administratively exempt. All non-exempt active component personnel will achieve full vaccination no later than 90 days from the date of ref (c) [August 30, 2021]. . . .”

21. In MARADMIN 462/21, Defendant Berger cautioned: “FDA Licensed vaccine(s) are the only vaccine(s) that can be mandated for DoD personnel at this time.”

22. MARADMIN 462/21 further states:

“The provisions contained within paragraph 3.a of this MARADMIN constitute a lawful general order and any violation of these provisions is punishable as a violation of Article 92 of ref (i) [Uniform Code of Military Justice]. Marines shall take action to fully immunize themselves against COVID-19 per ref (j). Paragraph 3.a is punitive and applies without further implementation. Commanders, commanding officers, and officers in charge shall issue appropriate orders to ensure that their Marines and Sailors are fully vaccinated. In accordance with Rule for Court Martial 306 of ref (n), initial disposition authority for cases arising from COVID-19 vaccine refusals is withheld to the general court-martial convening authority level”

23. On September 3, 2021, the Surgeon General of the Navy issued a memorandum to the commanders of the Naval Medical Forces that stated:

⁷

<https://www.marines.mil/DesktopModules/ArticleCS/Print.aspx?PortalId=1&ModuleId=542&Article=2761259>

1 “The FDA-approved vaccine, and the vaccine used under the EUA, have the
2 same formulation, and can be used interchangeably to provide the COVID-
3 19 vaccination series without presenting any safety or effectiveness
4 concerns. Navy medical providers can use the Pfizer-BioNTech doses
5 previously distributed under the EUA to administer mandatory
6 vaccinations.”

7 24. On September 8, 2021, the Assistant Secretary of the Navy for Manpower
8 and Reserve Affairs issued a memorandum entitled “Use of Pfizer-BioNTech Vaccine
9 for Mandatory Vaccination.” This memorandum stated:

10 “This memorandum clarifies that mandatory COVID-19 vaccinations . . .
11 can utilize the Pfizer-BioNTech and Comirnaty vaccines because the two
12 vaccines are the same formulation and interchangeable. . . On 24 August
13 2021, the Secretary of Defense mandated COVID-19 vaccinations for
14 service members on active duty or in the Ready Reserve, using only
15 COVID-19 vaccines that receive full FDA licensure in accordance with
16 FDA-approved labeling and guidance. Per the FDA’s guidance, the Pfizer-
17 BioNTech vaccine distributed under the EUA and the licensed Comirnaty
18 vaccine have the same formulation and are interchangeable. Navy medical
19 providers can use Pfizer-BioNTech doses previously distributed under the
20 EUA to administer mandatory vaccinations.”

21 25. On September 10, 2021, Headquarters Marine Corps Judge Advocate
22 Division’s Military Justice Branch released Practice Advisory 8-21 “Mandatory
23 COVID-19 Vaccinations” which states:

24 “Food and Drug Administration (FDA) licensed vaccinations are subject to
25 the vaccination mandate. Currently, the only vaccine with a FDA license is the
26 Pfizer-BioNTech product Comirnaty (COVID-19 Vaccine, mRNA).

27 However, in accordance with FDA guidance available at
28

1 <https://www.fda.gov/vaccines-blood-biologics/qa-comirnaty-covid-19->
2 vaccine-mrna, doses of the Pfizer-BioNTech COVID-19 vaccine authorized
3 under the FDA Emergency Use Authorization (EUA) produced prior to the
4 issuance of the FDA license may be used interchangeably with doses
5 produced post-licensing by Pfizer (Comirnaty). The Pfizer COVID-19
6 vaccines produced prior to and after FDA licensure have the same
7 formulation. Accordingly, commanders may order an unvaccinated Marine to
8 receive the Pfizer produced vaccine regardless of whether the particular dose
9 of the Pfizer vaccine to be administered was produced before or after FDA
10 licensure. Commanders, however, cannot order a Marine to receive any other
11 COVID-19 vaccine, even if that vaccine is approved for use under an EUA or
12 World Health Organization (WHO) Emergency Use listing (i.e., the Moderna
13 or Johnson & Johnson vaccines).”⁸

14 26. On September 14, 2021, the Assistant Secretary of Defense for Health Affairs
15 issued a memorandum to the military services directing that:

16 “Consistent with FDA guidance, DoD health care providers will use both the
17 Pfizer-BioNTech COVID-19 vaccine and the Comirnaty COVID-19 vaccine
18 interchangeably for the purpose of vaccinating Service members in
19 accordance with Secretary of Defense Memorandum, ‘Mandatory
20 Coronavirus Disease 2019 Vaccination of Department of Defense Service
21 Members,’ August 24, 2021.”

22 27. On October 6, 2021, Plaintiff Thomas Short submitted a request for
23 exemption from the requirement to take the Comirnaty vaccine based on his religious
24 beliefs.

25
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27 ⁸

28 <https://www.hqmc.marines.mil/Portals/135/Docs/Practice%20Advisories/Practice%20Advisory%208-21%20COVID-19%20Vaccine%20with%20Enclosure.pdf>

1 28. On October 7, 2021, the Deputy Commandant for Plans, Policies, and
 2 Operations released MARADMIN 533/21 “Supplemental Guidance to Mandatory
 3 COVID-19 Vaccination of Marine Corps Active and Reserve Components” which
 4 stated:

5 “. . . all active component service members must receive their first dose of
 6 Pfizer-BioNTech/COMIRNATY vaccine no later than 24 October 2021 and
 7 all reserve component service members must receive their first dose no later
 8 than 24 November 2021. All active component service members must
 9 receive their second dose of Pfizer-BioNTech/COMIRNATY vaccine no
 10 later than 14 November 2021 and all reserve component service members
 11 must receive their second dose no later than 14 December 2021. 2.b. Service
 12 members who elect to receive a Food and Drug Administration Emergency
 13 Use Authorization COVID-19 vaccine (e.g., Janssen or Moderna) or a
 14 vaccine included in the World Health Organization Emergency Use Listing
 15 (e.g., AstraZeneca) in lieu of the Pfizer-BioNTech/COMIRNATY vaccine
 16 will ensure completion of final dose no later than their respective component
 17 deadline (i.e., active component service member will receive a first dose of
 18 Moderna no later than 17 October 2021 and final dose no later than 14
 19 November 2021, or single dose of Janssen no later than 14 November 2021;
 20 reserve component service members will receive a first dose of Moderna no
 21 later than 16 November 2021 and final dose no later than 14 December 2021,
 22 or single dose of Janssen no later than 14 December 2021.)”⁹

23 29. On October 20, 2021, the Deputy Commandant for Manpower and Reserve
 24 Affairs denied Plaintiff Thomas Short’s request for religious exemption.

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 26
 27 ⁹ <https://www.marines.mil/News/Messages/Messages-Display/Article/2803707/supplemental-guidance-to-mandatory-covid-19-vaccination-of-marine-corps-active/>
 28

1 30. On October 23, 2021, the Deputy Commandant for Plans, Policies, and
 2 Operations issued another MARADMIN, “MARADMIN 612/21 Supplemental
 3 Guidance (2) to Mandatory COVID-19 Vaccination of Marine Corps Active and
 4 Reserve Components.”¹⁰ This MARADMIN directs:

5 “Marines refusing the COVID-19 vaccination, absent an approved
 6 administrative or medical exemption, religious accommodation, or pending
 7 appeal shall be processed for administrative separation IAW [in accordance
 8 with] this MARADMIN and supporting references. General Court-Martial
 9 Convening Authorities (GCMCA) retain authority to take any additional
 10 adverse administrative or disciplinary action they deem appropriate. . .
 11 Officer Administrative Separation. In the case of an officer refusing the
 12 vaccine, the cognizant Commander or Commanding Officer shall refer the
 13 case to the first GCMCA in the chain of command. GCMCAs will promptly
 14 report all officers refusing the vaccine to CMC (JPL) via the Officer
 15 Disciplinary Notebook, and will initiate processing for administrative
 16 separation. All reports of officers refusing vaccination must be formally
 17 closed with a report of disposition in accordance with MCO 5800.16. The
 18 least favorable characterization of service authorized for an officer refusing
 19 the vaccine is ‘General (under honorable conditions),’ unless inclusion of
 20 another basis for separation warrants characterization of the officer’s service
 21 as ‘other than honorable.’ ”

22 31. On October 26, 2021, Headquarters Marine Corps Judge Advocate Division’s
 23 Personnel Law Division issued another practice advisory: “Practice Advisory 9-21:
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 27

28 ¹⁰ <https://www.marines.mil/News/Messages/Messages-Display/Article/2820695/supplemental-guidance-2-to-mandatory-covid-19-vaccination-of-marine-corps-activ/>

Supplemental Guidance: Mandatory COVID-19 Vaccinations.”¹¹ Its preface explained its purpose as:

“This Practice Advisory provides information and guidance on MARADMIN 612/21, which supplements MARADMINs 462/21 and 533/21, the previously published Marine Corps guidance on mandatory COVID-19 vaccination. . . . This practice advisory supplements, and should be read in conjunction with, Practice Advisory 8-21 (Mandatory COVID-19 Vaccinations).”

32. On November 4, 2021, Plaintiff Thomas Short appealed the initial denial of his religious exemption request to Defendant Berger.

33. On March 14, 2022, the Assistant Commandant of the Marine Corps denied Plaintiff Thomas Short’s appeal of the initial denial of his request for religious exemption.

34. On March 16, 2022, Col. Charles Dudik, USMC, issued Plaintiff Thomas Short a written order to receive a COVID-19 vaccine by close of business March 21, 2022.

35. The wording of MARADMIN 533/21 presupposes there is no distinction between Comirnaty and Pfizer-BioNTech -- it always refers to “the Pfizer-BioNTech/COMIRNATY vaccine” as the vaccine being *mandated*, in distinction to the vaccines that Marines *may voluntarily choose*, i.e., “a Food and Drug Administration Emergency Use Authorization COVID-19 vaccine (e.g., Janssen or Moderna) or a vaccine included in the World Health Organization Emergency Use Listing (e.g. AstraZeneca) in lieu of the Pfizer-BioNTech/COMIRNATY vaccine.”

36. In fact, neither FDA-approved Cormirnaty nor SpikeVax are available at the YUMA Marine Air Station, or in the local civilian community. The CDC website

¹¹<https://www.hqmc.marines.mil/Portals/135/Docs/JAM/Pratice%20Advisory/Practice%20Advisory%209-21,%20Supplemental%20Guidance%20Mandatory%20COVID-19%20Vaccinations.pdf>

1 confirms that neither Pfizer and Moderna are currently making their FDA-approved
2 vaccines available. Only EUA-labeled vaccines are in circulation and available for use.

3
4 **FIRST CLAIM**
5 **(VIOLATION OF RELIGIOUS FREEDOM RESTORATION ACT)**
6 **(42 U.S.C. §2000bb-1, et seq.)**

7 37. Plaintiff hereby repeats and realleges each of the allegations contained in the
8 foregoing paragraphs of this Complaint.

9 38. The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*
10 (RFRA), states that the “[g]overnment shall not substantially burden a person’s exercise
11 of religion even if the burden results from a rule of general applicability.” 42 U.S.C. §
12 2000bb-1. RFRA applies to Defendants, as they constitute a “branch, department,
13 agency, instrumentality, and official of the United States.” 42 U.S.C. 2000bb-2(1).

14 39. The act broadly defines the “exercise of religion” to include “any exercise of
15 religion, whether or not compelled by, or central to, a system of religious belief.” 42
16 U.S.C. § 2000bb-2(4) (citing 42 U.S.C. § 2000cc-5(7)(A)).

17 40. The Supreme Court has held that the exercise of religion involves “not only
18 belief and profession but the performance of (or abstention from) physical acts that are
19 engaged in for religious reasons.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682,
20 710 (2014). The Supreme Court has articulated repeatedly that courts may not question
21 whether sincerely held religious beliefs are reasonable to a non-religious observer. *Id.*,
22 573 U.S. at 724.

23 41. RFRA imposes strict scrutiny on all actions of the federal government that
24 “substantially burden a person’s exercise of religion.” 42 U.S.C. § 2000bb-1(b).
25 Department of Defense Instruction (“DODI”) 1300.17 and Marine Corps Order 1730.9
26 explicitly recognize RFRA protections for members of the Marine Corps.

27 42. Unless the government satisfies the compelling interest test by
28 “demonstrat[ing] that [the] application of the burden to the person — (1) is in

1 furtherance of a compelling governmental interest; and (2) is the least restrictive means
2 of furthering that compelling governmental interest,” 42 U.S.C. §2000bb-1(b), the
3 governmental act violates RFRA.

4 43. Plaintiff Thomas Short has sincerely held religious beliefs that he should not
5 receive the mandated COVID-19 vaccine because he has a sincere religious objection to
6 it based on it having been tested for approval on cell lines derived from electively
7 aborted babies. He also objects to the use of the mRNA technology.

8 44. Defendants’ Vaccine Mandates substantially burden the Plaintiff’s sincerely
9 held religious beliefs by requiring him to take an action (receiving a COVID-19
10 vaccine) that would violate those religious beliefs or to suffer adverse employment
11 action and financial harm.

12 45. The adverse actions to which Plaintiff is subject may include: court-martial
13 (criminal) prosecution, involuntary separation, relief for cause from leadership
14 positions, removal from promotion lists, inability to attend certain military training and
15 education schools, loss of special pay, placement in a non-deployable status,
16 recoupment of money spent training the service member, and loss of leave and travel
17 privileges for both official and unofficial purposes.

18 46. Defendants’ Vaccine Mandates fail strict scrutiny. Defendants do not have a
19 compelling government interest in requiring Thomas Short to violate his sincerely held
20 religious beliefs by taking a COVID-19 vaccine, and Defendants’ Vaccine Mandates
21 are not the least restrictive means of accomplishing the government’s purported interest.
22 DoD operated for over a year during the COVID-19 pandemic with a ready and healthy
23 force that had not been fully vaccinated. More than 96% of the Marine Corps has been
24 vaccinated, and Defendants cannot show that achieving 100% vaccination compliance
25 is the least restrictive means of maintaining force readiness. Moreover, Defendants
26 possess multiple lesser restrictive methods of mitigating the spread of COVID-19,
27 including counting natural immunity as equivalent to a vaccine, masking, remote
28

teleworking, physical distancing, and regular testing. Of note, Plaintiff has tested positive for COVID-19 antibodies, rendering any putative benefit of vaccination negligible.

47. If Defendants were genuinely concerned about COVID-19 affecting its personnel, to the point of zero risk tolerance for any change of infection, they would need to implement these other mitigation protocols even if service members receive the vaccine, because vaccinated personnel can also carry, transmit, and become sick with COVID-19.

48. Defendants have granted medical and non-religious administrative exemptions to the Vaccine Mandates to hundreds of Marines. Accordingly, Defendants' Vaccine Mandates violate Plaintiff's rights under RFRA.

49. Because of Defendants' policies and actions, Plaintiff has suffered, and continues to suffer, economic injury and irreparable harm. Plaintiff is thus entitled to an award of monetary damages and equitable relief.

50. Plaintiff is entitled to a declaration that Defendants threaten to violate and have violated his rights under RFRA to the free exercise of religion and to an injunction against Defendants' policy and actions. Additionally, Plaintiff is entitled to damages in an amount to be determined by the evidence and this Court and the reasonable costs of this lawsuit, including reasonable attorneys' fees.

SECOND CLAIM

(42 U.S.C. §1983 – FREE EXERCISE)

51. Plaintiff hereby repeats and realleges each of the allegations contained in the foregoing paragraphs of this Complaint.

52. The First Amendment's Free Exercise Clause prohibits the government from enacting or enforcing non-neutral and non-generally applicable laws or policies unless they are narrowly tailored to a compelling government interest.

1 53. Plaintiff has a sincerely held religious belief that he should not receive a
2 COVID-19 vaccine.

3 54. Defendants' Vaccine Mandates substantially burden Plaintiff's sincerely held
4 religious beliefs by requiring him to take an action (receiving a COVID-19 vaccine) that
5 would violate those religious beliefs or suffer adverse employment action and financial
6 harm.

7 55. The adverse actions to which Plaintiff is subject may include: court-martial
8 (criminal) prosecution, involuntary separation, relief for cause from leadership
9 positions, removal from promotion lists, inability to attend certain military training and
10 education schools, loss of special pay, placement in a non-deployable status,
11 recoupment of money spent training the service member, loss of leave and travel
12 privileges for both official and unofficial purposes.

13 56. Defendants' Vaccine Mandates are not neutral and generally applicable. The
14 policy vests DoD and Marine Corps decisionmakers with the discretion to exempt
15 service members from the mandates for medical reasons and to exempt service
16 members already participating in COVID-19 vaccine trials, regardless of whether those
17 medical trials provide those service members with any protection from infection or
18 serious illness from COVID-19. Defendants have granted medical and non-religious
19 administrative exemptions to the Vaccine Mandates to hundreds of Marines.

20 57. Defendants' Vaccine Mandates fail strict scrutiny because Defendants do not
21 have a compelling government interest in requiring Plaintiff to violate his sincerely held
22 religious beliefs by taking a COVID-19 vaccine and forcing Plaintiff to take the vaccine
23 is not the least restrictive means of accomplishing the government's purported interest.
24 Indeed, DoD operated for over a year during the COVID-19 pandemic with a ready and
25 healthy force that had not been fully vaccinated.

1 58. Moreover, Defendants possess multiple lesser restrictive methods of
 2 mitigating the spread of COVID-19, including counting natural immunity as equivalent
 3 to the vaccine, masking, remote teleworking, physical distancing, and regular testing.

4 59. Indeed, Defendants will need to implement these other mitigation protocols
 5 even if service members receive the vaccine, because vaccinated personnel can also
 6 carry, transmit, and become sick with COVID-19. Centers for Disease Control and
 7 Prevention, “Science Brief: COVID-19 Vaccines and Vaccination” (last updated
 8 September 15, 2021), <https://tinyurl.com/2tpvhnnns>.

9 60. Moreover, more than 96% of the Marine Corps is vaccinated, and Defendants
 10 cannot show that requiring 100% vaccination rate is the least restrictive means of
 11 maintaining force readiness.

12 61. Accordingly, Defendants’ Vaccine Mandates violate Plaintiff’s rights to the
 13 free exercise of religion under the First Amendment.

14 62. Because of Defendants’ policy and actions, Plaintiff has suffered and
 15 continues to suffer irreparable harm. He is thus entitled to equitable relief.

16 63. Plaintiff is entitled to a declaration that Defendants violated his First
 17 Amendment rights to free exercise of religion and an injunction against Defendants’
 18 policy and actions. Additionally, Plaintiff is entitled to the reasonable costs of this
 19 lawsuit, including reasonable attorneys’ fees.

20
 21 **THIRD CLAIM**
 22 **(VIOLATION OF 10 U.S.C. §1107a)**

23 64. Plaintiff realleges each of the allegations contained in the foregoing
 24 paragraphs of this Complaint.

25 65. This case involves an actual controversy surrounding the legality of orders or
 26 actions the Defendants have taken with regard to vaccinating service members against
 27 COVID-19 in the absence of their statutory obligations.
 28

66. Defendants violated a federal statute, namely 10 U.S.C. §1107a, as well as 21 U.S.C. §355 and DoDI 6200.02, when it illegally ordered Plaintiff to submit to COVID-19 vaccinations with an unlicensed “IND”, or a vaccine “unapproved for its applied use” status, or in an EUA status.

67. As a result of the defendants’ unlawful actions, the Plaintiff has suffered damages, including being ordered to take an unlicensed drug of unknown long-term safety profile; being subject to or threatened with disciplinary action under the Uniform Code of Military Justice (UCMJ), or adverse administrative action that would characterize Plaintiff’s voluntary service as “other than honorable.”

FOURTH CLAIM (VIOLATION OF ADMINISTRATIVE PROCEDURES ACT)

68. Plaintiff realleges each of the allegations contained in the foregoing paragraphs of this Complaint.

69. Defendants are “agencies” under the APA, 5 U.S.C. §551(1), the Vaccine Mandates complained of herein are each a “rule” under the APA, *id.* at §551(4), and Defendants’ actions complained of herein are “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court,” *id.* at §704.

70. The APA prohibits agency actions that are “arbitrary, capricious, [or] an abuse of discretion.” 5 U.S.C. §706(2)(A). The Vaccine Mandates and Defendants’ actions implementing the Vaccine Mandates are arbitrary, capricious, and an abuse of discretion for several reasons.

71. Defendants violated their own regulations, DoDI 6200.02¹², and AR 40-562, by ignoring the Plaintiff’s right to informed consent and vaccinating members of the armed forces without complying with applicable federal law and implementing regulations.

¹² <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/620002p.pdf>

72. The Defendants' failure to follow federal law and regulations creates a legal wrong against the Plaintiff.

73. As a result of the Defendants' unlawful actions, the Plaintiff has suffered or will suffer damages, including being required to take an unlicensed drug of unknown long-term safety profile; being subject to or threatened with disciplinary action under the Uniform Code of Military Justice (UCMJ), including adverse administrative action that would characterize Plaintiff's voluntary service as "other than honorable."

WHEREFORE, Plaintiff prays that this Court:

- (a) Enter a declaratory judgment that the Vaccine Mandates violate Plaintiff's rights under the Religious Freedom Restoration Act;
- (b) Enter a declaratory judgment that the Vaccine Mandates violate Plaintiff's rights under the First Amendment to the United States Constitution;
- (c) Enter a declaratory judgment that the Mandates violate Plaintiff's rights under the Administrative Procedure Act and 10 U.S.C. §1107a;
- (d) Declare that Marine Corps Order 1730.9, at least as implemented with respect to Plaintiff, contains an unlawful standard of review for religious exemptions from immunizations.
- (e) Enjoin Defendants, as well as their agents, employees, and successors in office, shall be restrained and enjoined from enforcing, attempting to enforce, or threatening to enforce the COVID-19 vaccine mandate against Plaintiff or otherwise requiring Plaintiff to receive the COVID-19 vaccine.
- (f) Enjoin Defendants, as well as their agents, employees, and successors in office, shall be restrained and enjoined from taking any adverse action against Plaintiff based on his refusal to take the COVID-19 vaccine, including imposing non-punitive disciplinary measures, denying training opportunities available to vaccinated service members, or discharging Plaintiff from the Marine Corps.

- 1 (g) Award Plaintiff his costs and attorneys' fees;
2 (h) Order such other and further relief as the Court deems just and proper under
3 the circumstances.
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7 Dated: March 21, 2022

John J. Jakubczyk

JOHN J. JAKUBCZYK, ESQ.
ATTORNEY FOR PLAINTIFF

JURY DEMAND

Plaintiff hereby requests a jury trial in this matter.

Dated: March 21, 2022

John J. Jakubczyk
JOHN J. JAKUBCZYK, ESQ.
ATTORNEY FOR PLAINTIFF